BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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In re Applications of	)	MM Docket No. 94-10
	)	
The Lutheran Church-Missouri Synod	)	File Nos. BR-890929VC
	)	BR-890929VB
For Renewal of Licenses	)	
of Stations KFUO/KFUO-FM	)	ORAL ARGUMENT REQUESTED
Clayton, Missouri	)	

To: The Review Board

LIMITED EXCEPTIONS OF
THE LUTHERAN CHURCH-MISSOURI SYNOD

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Dated: November 1, 1995

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SUMMARY

The Lutheran Church - Missouri Synod (the "Church") has operated Station KFUO for over seventy years -- longer than the FCC has existed and longer than broadcasters have been regulated. It is the world's oldest religious broadcast facility. During the entire period of time that the Church's stations have been Commission licensees, their record has been exemplary. The Church, a mainstream organization with 2.6 million members, has used its stations to broadcast religious programming and classical music with an emphasis on classical religious music. It has been no secret that the Church's stations are religious, that for decades the Stations have been housed on the grounds of the Church's Concordia Seminary and that, over the years, seminarians have participated in work-study programs at the stations.

As the result of allegations raised in a petition to deny filed by the NAACP, the Church's 1989 license renewal applications were designated for hearing, primarily because of a discrepancy in the number of hires included in the EEO section of the renewal applications. As the Judge's Initial Decision ("ID") properly concluded, however, any inaccuracies in describing the number of hires were unintentional and the result of a good-faith misinterpretation of the form used by the FCC. The Judge also properly found, based on a full evidentiary hearing, that the Stations did not discriminate against any person. He further held that during the period February 1, 1983 to August 3, 1987, the Stations' overall affirmative action efforts were in substantial compliance with the Commission's EEO Rule.

Indeed, the Judge recognized that the Church's mission includes a desire to welcome men and women of every race and color into its fold. He also acknowledged that the Church's leadership included African Americans throughout the License Term, and that the Church has a long history of providing educational opportunities for minorities and in speaking out against racism and various forms of racial discrimination. During the License Term, the Stations hired minorities in excess of 100% of minority representation in the local workforce.

As demonstrated herein, the record evidence does not support the ID's conclusion that the Stations' Operations Manager lacked candor in his choice of wording in the 1989 EEO section of the renewal applications prepared with the assistance of counsel, or in two pleadings filed with the FCC by the Church's then communications counsel. The Judge found the Church's witnesses, including particularly the Operations Manager and former counsel, to be credible witnesses. Their candid and plausible explanations of events were uncontradicted and unchallenged. It is inappropriate and unprecedented to find that a licensee lacked candor where it relied on advice and arguments of counsel. Moreover, the Judge's own findings show that the Commission's EEO forms lack clarity and are flawed in major respects. In particular, the Commission's forms give no guidance whatsoever to religious broadcasters as to how they should respond to the questions posed.

The ID also found that the Church acted improperly in preferring to hire certain persons for religious reasons and, largely based on this unlawful finding, erroneously concluded that the Stations' overall affirmative action efforts during the period from August 3, 1987 to February 1, 1990 were unsatisfactory. Given the Commission's failure to provide appropriate guidance to religious broadcasters and the fact that the Church's record was far better than that of similarly situated licensees, it must be concluded that the Church substantially complied with the Commission's EEO Rule and policies. In any event, however, the Judge's second guessing of the Church's judgments about which of its job functions required religious knowledge in order to best fulfill the Church's mission contravenes the religious freedoms guaranteed by the First Amendment, raises serious Fifth Amendment equal protection concerns and violates the national policies established by Congress in section 702 of the Civil Rights Act and the Religious Freedom Restoration Act of 1993.

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LIMITED EXCEPTIONS OF
THE LUTHERAN CHURCH-MISSOURI SYNOD

The Lutheran Church-Missouri Synod (the "Church"), the licensee of Stations KFUO(AM) and KFUO-FM, Clayton, Missouri ("KFUO" or the "Stations"), by its attorneys and pursuant to Section 1.276 and 1.277 of the Commission's rules, hereby submits its "Limited Exceptions" to the Initial Decision ("ID") of Administrative Law Judge Arthur I. Steinberg in the above-referenced proceeding, FCC 95D-11, released September 15, 1995. The Judge correctly concluded that the Church's license renewal applications for the Stations ("1989 Renewals") should be granted but, based on errors of fact and law, erroneously found that the Church violated the Commission's EEO Rule, 47 C.F.R. § 73.2080 (1994), as well as erroneously assessed a forfeiture for lack of candor in the amount of $50,000 against the Church.

I. STATEMENT OF THE CASE

1. On September 29, 1989, the Church filed license renewal applications for the Stations covering the license term from February 1, 1983 - February 1, 1990 (the "License Term"). KFUO(AM) is a daytime only station that operates noncommercially and broadcasts religious programming. KFUO-FM is a Class C station that broadcasts classical music with a religious orientation as well as some religious programming and has accepted advertisements since March 1983.

Even after KFUO-FM began to accept advertising, the Board of Directors of the Church "believed that the main function of both Stations should remain as a ministry to support the Church and to nurture Christian faith." ID ¶¶ 6, 17. On January 2, 1990, the NAACP filed a petition to deny against the license renewal applications of several Missouri radio stations including those owned by the Church.

2. Four years later, on January 31, 1994, the Commission adopted a series of EEO actions, all of which were released on February 1, 1994. The Commission: (a) adopted a new EEO Policy Statement;[1/] (b) issued Notices of Apparent Liability against a large number of broadcasters imposing short term renewals, EEO reporting conditions and substantial fines; and (c) issued a Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 9 FCC Rcd 914 (1994) (the "HDO"), designating the Church's license renewal applications for hearing on issues as to whether the Church complied with the affirmative action provisions specified in Section 73.2080(b) of the Commission's rules, and whether the Church made misrepresentations or lacked candor with regard to the stations' EEO programs and the documents submitted in support thereof.

3. After a full evidentiary hearing, in which both the Commission's Mass Media Bureau and the NAACP actively participated, the Presiding Judge concluded that the public interest, convenience and necessity would be served by a grant of the Church's applications for renewal of the Stations' licenses. The Judge found, correctly, that the Church's mission includes a desire to welcome men and women of every race and color into its fold. ID ¶ 36. He also acknowledged that the Church's leadership included African Americans throughout the License Term, and that the Church has a long history of providing educational opportunities for minorities and in speaking out against racism and various forms of racial discrimination. ID ¶¶ 37, 39, 40-41. Consistent with its mission, the Church's policies at the Stations required employment on a

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1/ Policy Statement, 9 FCC Rcd 929 (1994), petitions for reconsideration and requests for clarification pending. In United States Tel. Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir. 1994), the court set aside two FCC forfeiture statements because they were not put out for comment under the Administrative Procedure Act. By virtue of this decision, the 1994 EEO Policy Statement is no longer being used by the Commission. Stauffer Communications, 10 FCC Rcd 5060, at ¶ 8 (1995).

racially nondiscriminatory basis throughout the License Term (ID ¶¶ 42-43), and the Church's CEO for the Stations was found to be a man of the highest commitment to racial equality. ID ¶ 47. Moreover, "[d]uring the License Term, no past or then present employee or job applicant complained that the Stations discriminated against him or her on the grounds of race or religion." ID ¶ 49.

4. As the ALJ also found, over the course of the license term, the Stations' staff averaged only about 20 full-time employees. The Stations made 43 full-time hires during the license term and sought referrals for 30 of those hires (69.8%). Of the Stations' 43 full-time hires, 25 (58.1%) were female and 7 (16.3%) were minority. ID ¶ 68. During the License Term, the Stations hired minorities at 104.5% of minority representation in the local workforce. (Church Prop. Findings ¶ 156).

5. However, because the Judge believed that the Stations violated the Commission's EEO Rule and policies by "improperly [giving] preferential hiring treatment to individuals with knowledge of . . . Lutheran doctrine, and to active members of [Church] congregations, for positions which were not reasonably connected with espousal of the Church's religious views" (ID ¶ 193), and because he found that the Stations "were not substantially compliant with the EEO rules and policies during the period from August 3, 1987 to the end of the License Term" (ID ¶ 252), he imposed EEO reporting conditions. The Judge also concluded that the Church lacked candor "in describing the Stations' minority recruitment program in its 1989 renewal applications, and in informing the Commission that knowledge of classical music was a requirement for the position of salesperson at the FM station." ID ¶ 257. Although the Judge found that this "lack of candor" was an isolated occurrence and an aberration in the Church's spotless 70 year record as a licensee, he imposed a $50,000 forfeiture. ID ¶¶ 260-61.

II. QUESTIONS PRESENTED

(1) Whether the Presiding Judge erred in concluding that the Church lacked candor.

(2) Whether the $50,000 fine imposed by the Judge is arbitrary and capricious.

(3) Whether the Judge erred in concluding that the Church did not substantially comply with the Commission's EEO Rule during the period from August 3, 1987 to February 1, 1990.

(3) Whether the Judge's conclusion that he could second-guess the Church's judgments about which of its job functions require religious knowledge violated the First Amendment, the Religious Freedom Restoration Act of 1993, and the national policy enacted by Congress in Title VII of the Civil Rights Act.

(4) Whether the Commission's EEO Rule as applied to the Church in this case violates the Fifth Amendment.

III. ARGUMENT

A. The Evidentiary Record Fails to Establish Any Lack of Candor on the Part of the Church

6. In evaluating the Judge's findings and conclusions under the misrepresentation/lack of candor issue, it is important to bear in mind the principal reason that the issue was designated in the first place. The Commission was concerned about the fact that the number of hires reported in the 1989 Renewals turned out to be less than the number of hires indicated in subsequent submissions. HDO ¶ 27. The Presiding Judge correctly concluded that the discrepancy was a "simple oversight" resulting from the two different questions that were asked by the Commission, and the oversight did not constitute misrepresentation or lack of candor. ID ¶ 229.

7. The designated misrepresentation/lack of candor issue also loosely encompassed certain responses that were made by the Church in its renewal applications and pleadings related thereto. In connection with these responses, the Judge perceived a lack of candor in two limited respects: (a) he concluded that Operations Manager Dennis Stortz lacked candor when describing the Stations' minority recruitment in the 1989 Renewals (ID ¶ 230); and (b) he concluded that the Church lacked candor because Mr. Stortz represented on two occasions that knowledge of classical music was required for a sales position at the FM station. ID ¶ 246. The Judge's conclusions are erroneous.

1. There Is No Evidence That the Church Intended to Deceive the Commission

8. According to well established Commission case precedent, an "intent to deceive" is an "essential element" of a violation of the duty of candor. Fox Television Stations, Inc., 77 RR2d 1043, at ¶ 60 (1995), (citing Swan Creek Communications v. FCC, 39 F.3d 1217, 1222 (D.C. Cir. 1994)); accord Garden State Broadcasting Ltd. Partnership v. FCC, 996 F.2d 386, 393 (D.C. Cir. 1993); Fox River Broadcasting, Inc., 102 F.C.C.2d 1179, at ¶ 1135 (1986), modified, 5 FCC Rcd 3252 (1990). "[B]efore an applicant or licensee may be found to have withheld relevant information, it must be shown that the party knew that the information was relevant and intended to withhold it." Fox Television Stations, Inc., 77 RR2d 1043, at ¶ 60; Abacus Broadcasting Corp., 8 FCC Rcd 5110, at ¶ 10 (Rev. Bd. 1993).

9. The Commission will not infer actual or attempted deceptions or improper motives from alleged application errors, omissions or inconsistencies, accompanied by speculation and surmise but lacking factual support. See Scott & Davis Enterprises, Inc., 50 RR2d 1251, at ¶ 17 (Rev. Bd. 1982). Inaccurate information resulting from carelessness, exaggeration, faulty recollection, or merely falling short of the punctilio normally required by the Commission is insufficient to demonstrate deceptive intent. See Calvary Educational Broadcasting Network, Inc., 9 FCC Rcd 6412 (Rev. Bd. 1994); MCI Telecommunications Corp., 3 FCC Rcd 509, at ¶ 136 (1988) ("bare existence of a mistake" without indication of deception does not elevate a mistake to an intentional misrepresentation) (citing Kaye-Smith Enterprises, 71 F.C.C. 2d 1402, at ¶ 129 (1979)); Standard Broadcasting, Inc., 7 FCC Rcd 8571, at ¶ 11 (Rev. Bd. 1992).

10. Moreover, in order for the Commission to find an intent to deceive from motive, more than speculation, innuendo or hearsay evidence is required. Joseph Bahr, 10 FCC Rcd 32, at ¶ 6 (Rev. Bd. 1994). The Commission has emphasized that where charges of misrepresentation and lack of candor form the basis for a license renewal or revocation proceeding and an adverse decision may take away a man's possession, his profession and his good name, the very highest quality of proof should be adduced. See Radio Station WTIF, Inc., 7 RR2d 30 (1965).

11. Finally, "the Commission has been . . . reluctant to impute a disqualifying lack of candor to an applicant where the record shows good faith reliance on counsel." Abacus, 8 FCC Rcd 5510, at ¶ 12. See also Fox Television Stations, Inc., 77 RR2d 1043, at ¶ 119 n.68. ("We do not think it appropriate to find a lack of candor where a licensee has not second guessed its own attorneys, as long as the advice rendered appears reasonable and is relied on in good faith. We do not wish to create an environment in which licensees are discouraged from seeking and following the advice of legal counsel.").

12. The Judge's lack of candor conclusions against the Church -- a mainstream non-profit religious institution with 2.6 million members -- tarnish the Church's reputation and the broadcast stations that it has nurtured over many decades to serve the public interest and their community. Yet, those conclusions of lack of candor completely fail to meet the standards set forth in the above cited cases. Rather, they are contrary to the record evidence, as well as contrary to the Judge's own findings. The conclusions are based solely on impermissible speculation and surmise.

(a) The Description of the Station's EEO Program

13. With respect to the Church's EEO recruitment program, the Judge found flaws in the following sentences in KFUO's 1989 EEO Program:

> [1] When vacancies occur, it is the policy of KFUO and KFUO-FM to seek out qualified minority and female applicants. [2] We deal only with employment services, including state employment agencies, which refer job candidates without regard to their race, color, religion, national origin or sex. [3] We contact the various employment services and actively seek female and minority referrals and we specifically request them to provide us with qualified female and minority referrals. [4] See sample reply form attached.

The Judge characterized these statements as "highly misleading." ID ¶ 230.

14. An evaluation of the context in which the above statements were made, however, shows that the Judge erred in his conclusions. The Commission's Broadcast Equal Employment Opportunity Model Program Report, FCC Form 396, provides "guidelines" to broadcasters. The form itself has numerous flaws which the Judge recognized in various portions of the ID. For instance, the Judge found that

"[n]either the form nor the Filing Instructions specified whether the response should include part-time as well as full-time employees, or whether the renewal applicant should count people hired who thereafter departed before the end of the period." ID ¶¶ 173, 186 n.21, 240-241. He also found that the form did not require the Church to provide information about its decades-old work/study training program. ID ¶ 240. He further stated:

> nowhere in the Filing Instructions, the Form 396, or the Commission's Model EEO Programs are the phrases "qualified individuals," "qualified persons," "qualified minority and female applicants," or "qualified minority and women applicants" defined. Likewise, nowhere in the Filing Instructions, the Form 396, or the Model EEO Programs does the Commission require a licensee to provide a detailed explanation, or indeed any explanation, of the criteria that the licensee uses to determine whether minority or female applicants are "qualified."

ID ¶ 244. In addition to these flaws, neither the Model Program nor the instructions provide any guidance to religious broadcasters.

15. While the Judge found numerous flaws in the Form 396, he disregarded what is arguably the most important flaw -- the fact that the form does not specify the time period to which it applies. Specifically, there is no indication in the form that it encompasses the entire prior license period. In fact, the only question in the form that refers to a time period (the question on "Job Hires") refers to the 12-month period prior to the filing of the renewal. The remainder of the form is couched in the present tense and appears more directed to the present, or even the future, than the past. See Church Ex. 9.

16. The Judge's conclusion that the four sentences enumerated above in KFUO's 1989 EEO Program constituted a lack of candor in this context is not supported by the facts or the law. First, the Judge concluded that "Mr. Stortz testified truthfully at the hearing, even when that testimony was likely to have had an adverse effect on the Church's case." ID ¶ 259. He further concluded that the testimony of Reverend Devantier, Mr. Stortz's supervisor, was "entirely credible." Id. These conclusions seriously undercut the subsidiary conclusion that Mr. Stortz's statements in the 1989 EEO Program were lacking in candor. Second, Mr. Stortz's testimony explaining his use of the language in the 1989 EEO Program was entirely

plausible, and there is no reason to believe that he intended to withhold relevant information. Third, Mr. Stortz relied upon the Church's former counsel, Ms. Cranberg, who assisted him in reviewing and editing the EEO Program. (Church Ex. 8, p.2; Church Ex. 4, pp. 18-19).

17. Sentence (1) reads: "When vacancies occur, it is the policy of KFUO and KFUO-FM to seek out qualified minority and female applicants." According to the conclusions in the ID at ¶ 231, "[t]his sentence failed to provide the Commission with a complete and fully informative depiction of the Stations' License Term minority recruitment efforts and, therefore lacked candor." In his testimony, however, Mr. Stortz described the Church's commitment to nondiscrimination and affirmative action which included the outreach efforts that had recently been undertaken. (Church Ex. 4, pp. 5-6; pp. 17-18; Tr. 773-777). This testimony was credited by the Judge. ID ¶¶ 42-44. Furthermore, and significantly, Mr. Stortz testified that he made the statement that it "is the policy of [the Church] to seek out qualified minority and female applicants when vacancies occur" because at the time the renewal application was completed -- toward the end of the license period -- this was generally the case. ID ¶ 150. FCC Form 396 does not ask about a station's entire seven year license term recruitment efforts, and the fact that Mr. Stortz's response did not attempt to discuss every hire over the entire license term is certainly not unreasonable and absolutely not a lack of candor. Mr. Stortz's testimony on this point was not further questioned at the hearing by the NAACP, the Bureau or the Judge.

18. Contrary to the conclusions at paragraphs 231 and 236-238 of the ID, there is no reason whatsoever to believe that Mr. Stortz somehow knew that he should have added that the Church had not sought out qualified minority and female applicants in every instance or that he needed to add that this was not done throughout the License Term. The form does not call for it, and he was not told to do so by FCC counsel. There is not a scintilla of concrete evidence that Mr. Stortz intended to withhold this information.

19. Other factors also militate against any finding of lack of candor. The Judge himself found the EEO form deficient in failing to define the term "qualified minority." The form itself and the paragraph in

question are written in the present tense. In retrospect, perhaps it would have been better if Mr. Stortz had been more clear as to the time reference of his statements, but there was no evidence of any intent to deceive. See Abacus Broadcasting Corp., 8 FCC Rcd 5110, at ¶ 10 (no lack of candor where filing was made without intent to deceive). If the Church is to be held to the standard of precision the ID would imply, then every licensee who included a statement of station policy similar to Mr. Stortz's in describing its EEO efforts but failed to recruit for minorities in every instance would similarly be guilty of lacking candor. It is noteworthy that there are many cases involving licensees who failed to adequately affirmatively recruit and hire minorities, yet were not even charged with a lack of candor. See, e.g., California Renewals, 9 FCC Rcd 894 (1994); Texas Renewals, 9 FCC Rcd 879 (1994) (Commission found deficient the recruitment efforts of licensees who described their EEO efforts as "regular" or "concentrated" but did not add a lack of candor issue).

20. Moreover, the record evidence supports Mr. Stortz's explanation that at the time he made the statement about the Church's policy of seeking out minority and female applicants, it was truthful. It was only two months earlier in July 1989 that the former FM General Manager, Thomas Lauher, had modified sample EEO letters he obtained from an NAB reference book and sent them to at least ten local universities and personnel agencies seeking minority and female referrals. ID ¶ 119-120. Between the time that the letters were sent out and the filing of the renewal applications there were only four full-time hires, including the rehire of Christine Keseman. Two of the other hires (Rev. David Schultz and Angela Burger) were for positions at the AM station that without question required Lutheran knowledge. (Church Ex. 4, Att. 6). It is inappropriate to suggest that Mr. Stortz knew he should have revealed that the referral forms were not used on one or two occasions and had some sort of "intent" to withhold this fact. The record also demonstrates that referral sources were contacted for four of the five positions that opened up during the remainder of the License Term, after the renewals were filed, and in the only position for which a referral source was not contacted, the person hired, John Oberman, was an outside consultant who joined the

station's staff as an Associate Director of Development of the AM station, a position involving religious fundraising. (Church Ex. 4, Att. 6). Accordingly, Sentence 1 was substantially accurate.

21. Sentence (2) in the KFUO Program reads: "We deal only with employment services, including state employment agencies, which refer job candidates without regard to their race, color, religion, national origin or sex." The Judge criticized this statement as "inaccurate," "exaggerated" and "not fully informative." ID ¶ 233. He faulted the Church for using the plural word "services" and stated that the only employment service the Stations utilized during the License Term was the Lutheran Employment Project of St. Louis. Id.

22. The conclusions set forth in the ID are simply wrong because the Judge misread both Sentence (2) and the record evidence. First, the sentence says only that any employment services that the Church actually used were non-discriminatory, i.e., that the Church did not use discriminatory employment services.[2/] Second, Mr. Stortz's reference to "employment services" was true. The record demonstrates that in addition to the Lutheran Employment Project of St. Louis, the Church contacted Snelling & Snelling, Roth Young Personnel Service of St. Louis and Sales Recruiters Irvin-Edwards. ID ¶ 120. Thus, there is no basis for any finding of lack of candor with regard to this sentence.

23. The Judge's criticisms of Sentences (3) and (4) suffer the same flaws as his criticisms of Sentences (1) and (2). The sentences read: "We contact the various employment services and actively seek female and minority referrals and we specifically request them to provide us with qualified female and minority referrals. See sample reply form attached." The Judge particularly condemned the Church for not

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[2/] It bears noting that this kind of sentence, using the plural form, is very standard in FCC forms. For instance, the Commission's FCC Form 396-A states in the recruitment section:

> In addition to the organizations noted above, which specialize in minority and women candidates, we will deal only with employment services, including State employment agencies, which refer job candidates without regard to their race, color, religion, national origin or sex. Examples of these employment referral services are: . . .

revealing that various employment services were contacted on only one occasion. ID ¶ 234. However, the sample form that was attached to the Church's EEO Program clearly reflects that it was not being sent in connection with a specific job opening and requests minority and female referrals for job openings that may occur from time to time. Sentences (3) and (4) together state only that forms like the sample were used. Moreover, as explained earlier in paragraph 20, only one of the four positions that opened between July 1989 and the filing of the renewals was not a rehire or did not require Lutheran knowledge, and therefore would even arguably have called for contact with secular recruitment sources. Thus, there is no basis at all for the Judge's conclusion that Mr. Stortz's statements misled the FCC into believing that the form was used for each vacancy, much less that there was an "intent" to omit relevant information by attaching the sample. The findings in the ID reflect that "Mr. Stortz testified that he had no intention of misleading the Commission by attaching the sample," (ID ¶ 34), and there is no evidence to the contrary.

(b) The "Requirement" for Knowledge of Classical Music

24. The Judge's conclusions on the statements of Mr. Stortz with respect to the need for knowledge of classical music for certain positions at the FM station cannot be reconciled with his factual findings and legally do not constitute lack of candor. In his conclusions, the Judge stated that "the Church was lacking in candor when it stated in its February 23, 1990 Opposition to the NAACP's Petition to Deny and again in its September 21, 1992 Motion to Strike and Reply to Comments that classical music knowledge was a requirement for a position as a salesperson at the FM station." ID ¶ 246. The Judge noted that the Opposition was drafted by Marcia Cranberg, the Stations' then legal counsel, but faulted the Church because Mr. Stortz provided an affidavit concerning the facts asserted therein. Id.

25. There is no justification for the harsh conclusions on this matter reached by the Judge. The Church's outside consultant, Concert Music Broadcast Sales, had counseled station management that KFUO-FM should target sales people who were knowledgeable about classical music and could talk credibly about the music. ID ¶ 140. Furthermore, the Church's former legal counsel, Ms. Cranberg,

suggested the argument in which the word "requirement" was used, and was intimately involved in drafting the statements. ID ¶¶ 153, 157. Indeed, it was Ms. Cranberg who first used the word "requirement" in counseling Mr. Stortz. (Tr. 990-91).

26. Mr. Stortz provided accurate, complete and reasonable explanations concerning the statements in question. Both Ms. Cranberg and Mr. Stortz gave credible testimony as to why the word "requirement" had been applied to classical music knowledge in the pleadings in question. The Judge fully credited those explanations in his findings. ID ¶¶ 136-144, 152-168. Ms. Cranberg testified that in drafting the pleadings she used as synonyms the terms "knowledge of classical music," "classical music training," "expertise in classical music" and a "working knowledge of classical music." She later learned that although the FM station sought salespeople with knowledge of classical music, it also had hired people without such knowledge when necessary, and acknowledged candidly that the word "requirement" was "probably an overstatement." ID ¶¶ 159-160. Ms. Cranberg testified, "I wish that I had used another word." (Tr. 1027-28). Both Ms. Cranberg and Mr. Stortz were clear that there was no intent to mislead the Commission. ID ¶¶ 160, 167. Indeed, in December 1992, long before designation, Mr. Stortz provided an Affidavit to the Commission which presented a complete and honest explanation of the use of the word. ID ¶ 167.

27. The issue is thus one of whether Mr. Stortz should have second guessed the Church's own attorneys on the phraseology used. However, as long as advice of counsel appears reasonable and is relied on in good faith, the Commission has made it clear that it is not appropriate to find lack of candor. Fox Television Stations, Inc., 77 RR2d 1043, at ¶ 119 n.68; Abacus Broadcasting Corp., 8 FCC Rcd 5110, at ¶ 12. There was nothing untoward in the legal advice the Church received. In fact, the evidence reflects that Arnold & Porter had successfully made a similar argument in an earlier FCC case. The word "preferred" might, as the Judge found, have been more accurate (ID ¶ 251), but this shows that at most the Church lacked precision -- not that there was any intent to deceive. Ms. Cranberg testified that she would have made

the same argument in any event. ID ¶ 161. Once again, there is absolutely no evidence that Mr. Stortz intended to withhold relevant information.

2. The Judge's Conclusion That the Church Had a Motive to Deceive Is Based Solely on Speculation

28. The Judge's conclusions concerning Mr. Stortz's statements about the Church's EEO Program and concerning his statements about the need for knowledge of classical music are rife with speculation, surmise and the same tendency to overstatement that he has attributed -- wrongly -- to Mr. Stortz. The Judge states that "Mr. Stortz knew that the stations did not seek out qualified minority job applicants on anything resembling a regular or systematic basis." As the record shows, however, Mr. Stortz never made any such statement. The Judge then proceeds to speculate as to Mr. Stortz's intention. ID ¶¶ 237-238. Similarly, the Judge reaches the conclusion that "Mr. Stortz knew that knowledge of classical music was not an absolute requirement for the position of salesperson at the FM station," despite the fact that Mr. Stortz never said it was an "absolute" requirement. ID ¶ 249.

29. As discussed earlier, in order to find an intent to deceive from motive, more than speculation and innuendo are required. Joseph Bahr, 10 FCC Rcd 32, at ¶ 6. If the Church is deemed to have lacked candor based on such speculation, then every other licensee whose EEO Program is ruled to be deficient could likewise be considered to lack candor. In this case, the reputation of not just an individual or a company is involved, but rather the reputation of a Church with 2.6 million members is at stake. The conclusion that a Church lacked candor is not appropriate without the highest quality of proof, and in this case such proof is totally nonexistent.

30. The facts presented in this case clearly militate against any conclusion that the Church had a motive to deceive. There is abundant record evidence of the Church's commitment to equal employment opportunity and dedication toward helping minorities. During more than half of the License Term, from February 1, 1983 to August 3, 1987, the Judge concluded that the Stations' overall efforts complied with the Commission's EEO rule. While the Stations may have slipped toward the end of the license period in terms

of their hiring parity under FCC guidelines, the management-level personnel who testified candidly admitted that they wish more had been done, but steadfastly maintained that there was never any attempt to deceive the Commission. Minorities were hired at the stations throughout the License Term, and the Stations did not discriminate. Indeed, when minority employment fell in the late 1980s as the result of the death of one employee and the voluntary departure of others, the Stations took earnest measures to recruit minorities. Caridad Perez, an Hispanic female, was hired as a salesperson (a Top Four Job category position) in March 1988. (Church Ex. 4, p. 12; Tr. 763). Mr. Lauher, the FM General Manager from May 1987 until July 1989, commenced a very extensive evaluation of the Stations' EEO posture. Amazingly, the Judge uses Mr. Lauher's efforts as the basis for inferring a motive to deceive. Such an inference could well serve to discourage licensees from undertaking efforts to evaluate their EEO programs for fear that subsequent efforts might not be sufficient -- hardly an outcome the FCC should want. In contrast to the unwarranted inferences and speculation of the Judge, Mr. Lauher's efforts demonstrate the Church's diligence and desire to comply with the FCC's EEO Rule and policies.

31. The circumstances surrounding the filing of the license renewal applications also dispel any motive to deceive. The Stations did not have either an AM or an FM General Manager at the time that the applications were prepared and filed. A new AM General Manager did not start until October 1, 1989 and a new Acting General Manager for the FM station did not start until October 1989. (Joint Ex. 1). It is clear from his testimony that Mr. Stortz described the Stations' EEO program in the Renewals as best he was aware it worked. He had never filled out a renewal application previously, and he relied on FCC counsel throughout the process. She did not alert him to any concerns about the words used. Accordingly, there is no demonstrable evidence of any lack of candor on the part of Mr. Stortz or the Church and no sanction should be imposed. Fox Television Stations, Inc., 77 RR2d 1043, at ¶ 119.

3. The Imposition of a $50,000 Fine is Arbitrary and Capricious

32. As the above discussion demonstrates, the ID's conclusion that the Church lacked candor should be reversed. In any case, the ID's imposition of a $50,000 fine against the Church is statutorily precluded and not supported by applicable case precedent.

33. The license renewal applications in question cover the period from February 1, 1983 - February 1, 1990. During that period of time the applicable forfeiture provisions, Section 503(b)(3) of the Communications Act provided that broadcast licensees could not be fined for violations occurring more than three years prior to the date of issuance of the notice of apparent liability. See Implementation of P.L. 95-234 Forfeiture Procedures, 44 RR2d 565, 566 (1978). It was not until 1992 -- after the license term in issue here -- that Congress amended the Act to include as Section 503(b)(6) a provision which extends the statute of limitations to the entire license term and continues the license term in effect pending a decision on a renewal application. Pub. L. No. 102-538, 106 Stat. 3543 (enacted October 27, 1992); see also Order, FCC 93-12 (released January 23, 1993). Significantly, the 1992 amendment does not contain any provision indicating that the change was to be applied retroactively.[3/] Thus, the Commission is bound by the 1978 provision with respect to this case and lacked authority on January 1, 1994 to propose a fine for activity that occurred five years earlier.

34. Furthermore, apart from the statutory problem, Commission case precedent does not support a fine of $50,000, which is excessive by any standard. In fact, the Judge cites only one case in support of a $50,000 fine and that is his own Initial Decision in Dixie Broadcasting, Inc., FCC 93-12, (released July 7, 1993). Not only does Dixie lack any precedential effect because it is only an Initial Decision, the facts in that case were far worse than any in this case. In Dixie the Judge found three categories of continuing misrepresentations as well as lack of candor. There is no other apparent support for the $50,000 fine levied

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[3/] The Courts has held that a statute is not to be interpreted as having retroactive effect absent an express declaration by the legislative body. See Landgraf v. USI Film Products, 114 S. Ct. 1453, 1500 (1994).

against the Church by the Judge. In making predictive judgments about future broadcast performance, the Commission has stated that it will consider the nature of the misconduct and the applicant's record of compliance with FCC rules and policies. Fox River Broadcasting Inc., 102 F.C.C.2d 1179, at ¶ 35 (1986). Here the Judge correctly viewed the alleged misconduct as "an isolated occurrence, an aberration" in a spotless 70-year record. Accordingly, the fine must be eliminated as arbitrary and capricious.

B. The Judge's Conclusion That the Church Acted Unlawfully in Preferring to Hire Certain Persons for Religious Reasons Is Unconstitutional, and, in Any Event, Contrary to Federal Statutes and Policy

35. While he acknowledged that the Church and its Stations were fully committed to nondiscrimination on the grounds of race (ID ¶¶ 36-49), the Judge nonetheless held that the Church did not comply with the FCC's EEO Rule and policies. The Judge predicated this ruling in substantial part on his conclusion that it was "improper" for the Church to give employment preference to individuals with knowledge of Lutheran doctrine for job functions for which the Church believed such knowledge was necessary. Based on the 20 year old decision in King's Garden, Inc. v. FCC, 498 F.2d 51, 61 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974) ("King's Garden"), the ID accords the FCC the role of deciding which positions at the Stations were "reasonably connected" to the espousal of the Church's religious views, and uses the FCC's EEO Rule to penalize the Church for failing to fill all remaining positions without regard to applicants' knowledge of Lutheran doctrine. ID ¶¶ 193, 200; see also ID ¶ 219 (holding that the Church violated the EEO Rule by including a statement on its application form that it retained the right to give hiring preferences to persons who were members in good standing of a Church congregation). Because this ruling violates the First Amendment, the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-l (the "RFRA")[4/], and the federal policy adopted by Congress in promulgating an exemption for religious

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4/ In enacting the RFRA, Congress found that "governments shall not substantially burden the free exercise of religion even if the burden results from a rule of general applicability," and legislated that agencies can substantially burden the free exercise of religion only if they can demonstrate a "compelling governmental interest" and can show that the burden is the "least

(continued...)

institutions from the requirements of Title VII of the Civil Rights Act of 1964, the Review Board should summarily reverse. The underpinning of the Judge's decision, the King's Garden decision, is simply no longer good law. See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) ("Amos").[5/]

1. The ID's Intrusion on the Church's Process of Self-Definition Violates the First Amendment and the Religious Freedom Restoration Act of 1993

36. During the License Term, the Church believed in good faith that many of the job functions at the Stations required a knowledge of Lutheran doctrine and philosophies. ID ¶ 50. For example, the Church's judgment was that it was desirable, but not mandatory, for certain secretaries to have religious knowledge because these secretaries sometimes contacted pastors to enlist volunteers for on-the-air fund-raising events, gathered information for pastors about matters to be addressed on worship programs, and scheduled clergy to appear on days on the Lutheran calendar for which they had suitable knowledge. ID ¶ 53. Because of the desirability of knowledge of Lutheran principles for many positions, the Stations (and KFUO(AM) in particular) frequently placed advertisements in Lutheran periodicals such as the Lutheran Witness. ID ¶ 63. This newspaper was "widely distributed to members of Church congregations, including to its African American members." ID ¶ 63.

[4/](...continued)
restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1 (b). There is no evidence that the FCC has reevaluated its EEO Rule to ensure compliance with the RFRA.

[5/] In addition to this conclusion that the Church violated the FCC's EEO Rule by giving preference for certain jobs to applicants with knowledge of Lutheran doctrine, the Judge also believed that there were other respects in which the Stations' affirmative action efforts were "unsatisfactory" from August 3, 1987 to February 1, 1990. ID ¶¶ 213-222. The Church should, however, have been found to have substantially complied with the EEO Rule -- its record was far better than the licensees that the Commission has found violated the Rule. See the cases cited by the ALJ in ¶ 256 of the ID. When the Church's performance is evaluated in the proper light -- i.e., consistent with its First Amendment right to determine which of its job functions require religious knowledge -- it is even more clear that the Church's Stations complied with the EEO Rule.

37. The Judge ruled that the Church should be penalized because it "improperly" gave preference to individuals with knowledge of Lutheran doctrine for positions that he deemed not to be "reasonably connected with the espousal of the Church's views," including the secretarial positions described above. ID ¶ 200. But for the reasons given by the Court in Amos, this case-by-case determination by the Judge of whether particular job activities were "properly" considered religious violates the Free Exercise Clause of the First Amendment to the Constitution and the RFRA.

38. In Amos, a building engineer who worked for a gymnasium operated by an entity associated with a church was discharged because he failed to qualify for a certificate that he was a member of the church and eligible to attend its temples. The engineer sued under Title VII of the Civil Rights Act. Amos, 483 U.S. at 330-31. The gymnasium moved to dismiss on the ground that it was shielded from liability by the 1972 amendment to that act exempting religious organizations from claims of religious discrimination.[6/]

39. The Supreme Court rejected plaintiff's argument that section 702 violated the Establishment Clause of the First Amendment if construed to allow religious employers to discriminate on religious grounds in hiring for the janitorial position at issue. The Court held that section 702 had the secular purpose of alleviating "significant governmental interference with the ability of religious organizations to define and carry out their religious missions" (Amos, 483 U.S. at 335), and stated that Congress "acted with a legitimate purpose in expanding the section 702 exemption to cover all activities of religious employers." Id. at 339 (emphasis added). In so holding, the Court observed that

> it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider

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6/ The 1972 amendment to the Civil Rights Act of 1964 provides:

> The subchapter shall not apply ... to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. 42 U.S.C. § 2000e-1(a) (amending Pub. L. No. 88-352, § 702, 1964) [hereinafter "section 702"].